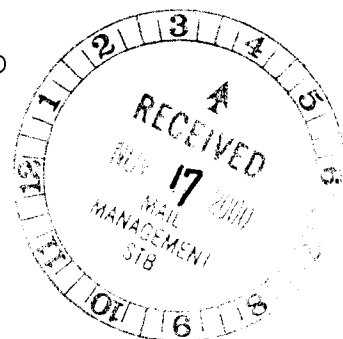


200429

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Ex Parte No. 582 (Sub-No. 1)
MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE
CITY OF MANKATO, MN

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I. INTRODUCTION

By decision served October 3, 2000, the Board initiated this Notice of Proposed Rulemaking (NPRM) proceeding. If adopted, the proposed rules would represent the first major revision of the Board's Railroad Consolidation Rules, 49 CFR Part 1180 et seq. since they were last changed as a result of the 1980 Staggers Rail Act amendments to the former Interstate Commerce Act. The NPRM sets November 17, 2000, as the deadline for initial comments by interested parties, with reply and rebuttal comments due December 18, 2000, and January 11, 2001, respectively. The NPRM indicates that the Board will issue its revised final regulations on June 11, 2001.

The City of Mankato ("Mankato") submits these initial comments in response to the Board's request.

II. BACKGROUND

Mankato is a city and political subdivision established under Minnesota law. About 90 miles south of the Twin Cities and 125 miles west of the Mississippi River in southern Minnesota, Mankato has a population of 32,000. Mankato is located along U.S. Highway 169 and U.S. Highway 14 on the banks of the

Minnesota River.

Two freight railroads, the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), and the Union Pacific Railroad Company ("UP"), presently serve Mankato. DM&E, an east-west class II carrier formed in 1986 from secondary lines of the former Chicago And Northwestern Transportation Company ("CNW"), presently operates from Winona (on the west bank of the Mississippi River) through Mankato westward into South Dakota. DM&E has a pending application at the Board for permission to build a 262 mile extension into Wyoming's Powder River Basin.¹ While the Board has previously found that the public convenience and necessity require construction of that extension, the Board has yet to complete its environmental permitting process.² UP owns and operates a north-south mainline of the former CNW³ which passes through the City on its way from the Twin Cities to Omaha. DM&E presently operates through downtown Mankato by way of trackage rights over UP's line.

Mankato's interest in this proceeding stems from its experiences in the DM&E construction case. The specific problem

¹ Docketed as FD No. 33407, Dakota, Minnesota & Eastern Railroad Corporation, Construction in the Powder River Basin.

² The Board made its public convenience and necessity findings in a decision served December 10, 1998. On September 27, 2000, the Board served a draft environmental impact statement. The Board is presently holding on line environmental hearings and comments on the draft EIS are due January 5, 2001. Mankato is participating in the environmental permitting proceeding.

³ UP acquired control of and merged with CNW about seven years ago.

is that the Powder River extension would transform DM&E from a grain hauling regional carrier with a modest traffic base and modest frequency levels (presently 3 trains daily through Mankato) into a virtual coal hauling conveyer built (expected to handle 37 trains per day) through the heart of the City. DM&E is considering whether to build a short bypass to the south of the City ("the southern bypass"), to lay a new track on the present UP alignment crossing the UP at one point, or substantially increasing its trackage rights use of the UP line.

Thus far the City has not taken a strong position on the DM&E construction case. While the City would prefer to see DM&E build the southern bypass, DM&E prefers either of two cheaper "in town" alternatives: construction of a new DM&E route on the UP alignment or greater use by DM&E of its trackage rights over UP's existing track through the downtown area. Presumably UP would have to consent to increased use of the trackage rights. The parties had previously signed an agreement with the DM&E ("the Community Partnership Agreement") which is binding on the railroad as long as the City desires to abide by its terms but allows the City to cancel it at anytime for any reason.⁴ A few weeks ago the City exercised its right to terminate.

Regarding specific issues, the City fears that the noise and vibration associated with the "in town" alternatives might adversely affect a flood control project along the right of

⁴ Should the City cancel the agreement, DM&E is relieved of its obligations under the agreement.

way the line traverses. Also the City fears, absent mitigation measures, that any "in town" solution would have numerous adverse effects on street and pedestrian traffic, public safety, property values, emergency vehicle access, environmental considerations, and the quality of life generally.

III. MANKATO'S COMMENTS

Mankato's experiences as a party in the environmental phase of the DM&E construction proceeding has led it to file comments here. Like rail construction cases, changes in traffic flows and operations associated with railroad mergers can have very serious environmental and community impacts as discussed below.

Mankato believes that the Board's well intended proposal would substantially raise the bar which merger applicants must pass to obtain approval without making it any easier for affected parties to obtain relief from the adverse effects of an approved transaction. But rather than raise so substantially the standard for future mergers, Mankato would like to see the Board scrutinize applicants' proposals more carefully using hearings (including on site hearings) chaired by objective fact finders to gather and analyze the evidence presented. In addition, Mankato would have the Board clarify and simplify the standards for adversely affected parties to obtain relief. While Mankato commends the Board on its greater emphasis on post-consummation remedies, it recommends serious attention be given to a phased in consummation of any major rail merger, with each

new step to be implemented after previous ones have been successful.

By now, the Board is well aware of the environmental and community impact issues involving railroad mergers. These issues initially surfaced with the Union Pacific-Southern Pacific merger and became an overriding concern with joint CSX Transportation/Norfolk Southern Corporation acquisition of Conrail ("the Conrail Acquisition Case"). Many of the same issues which Mankato faces with the DM&E construction case -- noise and air pollution, vibration, traffic congestion at grade crossings, safety problems at grade crossings and along the right of way, emergency vehicle access, and adverse affects on neighborhoods and property values -- surfaced in these railroad consolidation proceedings.

In the DM&E construction case, DM&E had originally proposed to build a bypass south of the City in lieu of its present routing through the City over trackage rights originally granted by UP's predecessor, the CNW. The added expense of this bypass led DM&E to look for other alternatives including the construction of a new line on the existing right of way and adjacent to UP's track through downtown Mankato.⁵ DM&E is also willing to consider routing its additional traffic over the present trackage rights route through downtown Mankato; however, that option would require UP's consent. Mankato finds any of these alternatives less satisfactory than the bypass because they

⁵ At some point DM&E would need to crossover UP's line.

entail more serious environmental and community impacts on populated areas than the bypass route involves. Of particular concern, the present UP right of way lies along a flood control project adjacent to the Minnesota River and there is considerable concern that the vibration of passing trains could weaken structures meant to contain flood waters. The Board's SEA itself noted many that the "in town" alternatives would have many potential adverse environmental and community impacts. Draft EIS at Table 5.1-8 of Volume IV.⁶

⁶ Among them, the SEA found:

- * Failure of the flood control system would result in significant damage to the City and potential loss of human life.
- * Noise and vibration will negatively affect 236 homes and 2,103 persons within the City, resulting in environmental justice concerns. Increased noise would cause one low-income census block group to experience a disproportionate impact.
- * There will be increased noise, dust, and safety concerns and vehicle delays along the 6.5 miles of right of way adjacent to area businesses as well as inconvenience due to reduced business access and potential reductions in business levels.
- * New routings for emergency vehicles will need to be established throughout the City due to blocked crossings and access problems.
- * Increased train frequencies and speeds will cause safety hazards and noise disturbances for users of adjacent parks and recreational trails.
- * There is a potential for contamination of 12 streams, the Blue Earth River, and ground water supplies.
- * Potential damage or destruction to 236 structures including 11 historic structures from train related vibration. (continued on next page)

As the Board is now well aware from the Conrail Acquisition Case, the City's fears are not based upon idle speculation. Many of the same problems were predicted by cities affected by the Conrail case and came to pass when that transaction was consummated. For example, the City of Fostoria (OH) is criss crossed by rail lines owned by CSX Transportation and Norfolk Southern Railroad. Changes in traffic patterns caused by their acquisition of assets and operations of Conrail have tied up rail traffic where their respective lines cross. The resulting rail congestion, in turn, caused trains to back up at highway/railroad crossings resulting in traffic delays, potential highway accidents and pollution, and the inability to police and fire departments to respond promptly to emergencies.

Another environmental and social impact issue common to both mergers and rail construction cases involves mitigation efforts and who should pay for those efforts. Mitigation can range from less expensive measures to costly grade separations and prohibitively expensive bypass routes and new alignments. Many of these measures are beyond the financial capability of the online community. In the case of the DM&E construction, it is the railroad and its customers (distant electric utility companies which may be able to get cheaper transportation rates due to the added rail competition) which benefit from the

* 15 county roads and city streets crossed by the tracks will experience increased frequency of vehicle delays. These include 103 school bus crossings per day.

railroad extension and improvement. Yet Mankato is being asked to pay a price for that improvement either through adverse socioeconomic impacts of an "in town" routing or mitigation measures. Similarly, modest cities such as Mankato have been forced to retain expensive, specialized engineering and legal counsel to make their views known at the Board. That is unfair considering that Mankato reaps no benefit from the railroad project.

The Board's advocacy of the use of voluntary agreements between parties to resolve merger related problems is a thread which pervades the NPRM. The Board appears to have seized upon the use of negotiated agreements between parties as a virtual panacea to merger related problems. Mankato believes that voluntary arrangements are always preferable to government mandated solutions. However, the Board's apparent extensive reliance on voluntary arrangements seems to overlook the very basic fact that those parties most likely to reach a negotiated solution are those with equal bargaining power.

In preparing these comments, Mankato reviewed the March 31 decision initiating the Advance NPRM. It noted suggestions that the Board could use its power to condition a merger to eliminate various class I railroad anticompetitive practices. To the extent that DM&E might seek to continue using its UP trackage rights (probably requiring a substantial upgrading of the line) or would build a new track on the existing right of

way⁷ -- either option in lieu of building the bypass route -- the City may be powerless to obtain mitigation relief from the Board. The City understands that under its precedent the Board has no jurisdiction over the construction of track improvements (including second tracks) or track rehabilitation where the line does not invade new territory. FD No. 33611, Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude And Ogden Junction, TX (served Aug. 21, 1998). Absent a basis for the Board to exercise its jurisdiction, there would be no basis for Mankato to obtain relief. Any revision of the Board's merger regulations that would permit the Board to condition future railroad mergers or reopen past transactions (such as that involving the UP-CNW merger) might possibly provide a basis for relief for Mankato. Regarding economic issues, the relief which the ICC and now the Board have historically granted to online communities in merger cases have involved preservation of competition and protection of essential rail service. Mankato is blessed with two potential rail competitors, DM&E and UP. Through DM&E, Mankato has access to CP Rail and potentially I&M RailLink, L.L.C. ("IMRL"). Unfortunately, both DM&E and IMRL are fairly weak financially. Should DM&E fail, rail competition would vanish to the extent it presently exists in the Mankato market. Similarly, should a merger divert sufficient traffic

⁷ To the extent that a new rail crossing may be required, the Board would have jurisdiction under 49 U.S.C. 10901(d) to order a new crossing.

from DM&E, thereby affecting its viability, both competition and essential rail service could be jeopardized. The simple fact of the matter is that the Board should scrutinize merger proposals more carefully than it has in the past when financially fragile class II and III railroads are involved and should lower the standard granting relief for class II and III railroads alleging loss of competition and essential rail service.

IV.

CONCLUSION

Mankato agrees with the Board: it is time to scrap the old rules. But Mankato sincerely hopes that as the Board crafts new rules, it pays attention to those citizens who are unintentionally affected by its actions.

Respectfully submitted,




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Due: November 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 17th day of November, 2000, served a copy of the forgoing on all known parties of record by first class U.S.Mail postage prepaid.



John D. Heffner